

REMARKS

The present communication is responsive to the Office action mailed November 6, 2008. A three-month extension of time extending the period of reply from February 6, 2009 up to and including May 6, 2009 is submitted herewith.

Claims 1-20 were rejected in the Action. Independent claims 1 and 18 have been amended herein. No claims have been added and claim 14 has been cancelled herein. Therefore, claims 1-13 and 15-20 are currently pending in the present application. Support for all claim amendments can be found in Applicants' originally filed disclosure. As such, no new matter has been added. Applicants set forth remarks relating to the Office Action below.

In the Action, the Examiner asserted that Applicants have not complied with one or more conditions for receiving the benefit of an earlier filing date because no petition was filed with Applicants' late claim for priority. On January 15, 2008, Applicants submitted a Preliminary Amendment with an attached Substitute Specification and a Request to Correct Filing Receipt. In the Substitute Specification, the first paragraph of the specification was revised to properly claim priority. However, no priority claim was added or cancelled with the January 15th Amendment. On February 4, 2008, the Patent Office issued a corrected filing receipt showing the proper priority claim for the present application. Applicants point out that M.P.E.P. § 201.11(V)(A) states that a petition under 37 CFR 1.78(a)(3) and the surcharge is not required for correcting a timely submitted benefit claim when changing the relationship of the applications (e.g., changing from "continuation" or "divisional" to "continuation-in-part" or from "continuation-in-part" to "continuation" or "divisional"). Therefore, a petition is not necessary to correct relationship (e.g., continuation to division) if the benefit claim to each of the applications were included in the specification upon filing of the application. Because no new applications were included in the Substitute

Specification or the Request to Correct Filing Receipt filed January 15th, a petition was not unnecessary. Only the relationship between the applications already in the claim for priority of the originally filed application was changed. Accordingly, Applicants respectfully assert that the current priority rejection is incorrect and should be withdrawn.

Further in the Action, claims 1-20 were rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which Applicants regard as the invention. Applicants respectfully traverse this rejection. There are several paragraphs in the specification that describe in detail the relationship of the engagement holes of the baseplates with respect to the surgical approach direction(s) that may be taken by a surgeon during a surgical procedure using the claimed device. For instance, paragraphs [0121]-[0123] of the specification state the following:

Also preferably, in order to provide for a holding of the static trial 100 or disc 160 for two additional (here, anteriopateral) insertion approaches, each static trial 100 or disc 160 also includes two additional holes 122a,182a and 122c,182c, one (e.g., 122a,182a) spaced apart from one of the anteriopaterally facing flat surfaces (e.g., 120a,180a), and the other (e.g., 122c,182c) spaced apart from the other of the anteriopaterally facing flat surfaces (e.g., 120c,180c). Accordingly, operation of the inserter/impactor 400 can fit the holding pin 408 into either of these two additional holes 122a,182a or 122c,182c, and hold the associated anteriopaterally facing flat surface (the one associated with the hole into which the pin 408 is fit) of the static trial 100 or disc 160 against the flat surface of the inserter/impactor 400 opposite the pin 408. For example, as discussed below with regard to the inserter/impactor 400, in a first anteriopateral approach for the trial 100 (as shown in Fig. 4i), 120a and 120d facing 420b, 120b and 120e not confronted, and 120c and 120f facing 420a, and a first anteriopateral approach for the disc 160 (as shown in

Fig. 4o), 180a and 180d facing 420b, 180b and 180e not confronted, 180c and 180f facing 420a. And, for example, as discussed below with regard to the inserter/impactor 400, in a second anteriolateral approach for the trial 100 (as shown in Fig. 4j), 120a and 120d facing 420c, 120b and 120e facing 420a, and 120c and 120f not confronted, and a second anteriolateral approach for the disc 160 (as shown in Fig. 4p), 180a and 180d facing 420c, 180b and 180e facing 420a, 180c and 180f not confronted.

It should be understood that preferably, in order to facilitate these additional approaches, the angle separating the anteriorly facing flat surface of the static trial 100 or disc 160 and one of the anteriolaterally facing flat surfaces of the static trial 100 or disc 160 is equal to the angle separating the anteriorly facing flat surface and the other of the anteriolaterally facing flat surfaces. Preferably, the surfaces are angled with respect to one another at an angle of 33.4 degrees.

It should also be understood that the inclusion of additional adjacent angulated surfaces (or placing the angulated surfaces in other locations on the trial or disc), and/or including corresponding holes adjacent to such surfaces, can provide the surgeon with additional approaches, e.g., other anteriolateral approaches, directly lateral approaches, posteriolateral approaches, and/or directly posterior approaches. For example, a trial or disc can have angled surfaces (and corresponding holes) along the entire perimeter of one or both of the baseplates, and thus enable the surgeon to engage the trial or disc from a number of angles, including anterior, posterior, lateral, anteriolateral, and posteriolateral angles.

Engagement holes 122a-122c of static trial 100 shown in FIG. 1c, clearly each have a longitudinal axis that is parallel to a longitudinal plane of angled flat surfaces 120a-120c respectively of static trial 100. Each of the surgical approach directions (i.e. anteriolateral approaches, directly lateral approaches, posteriolateral approaches) as outlined in paragraphs [0121]-[0123] above, are perpendicular to one of holes 122a-122c of static trial 100. As any one of the

instruments described in the specification engage the engagement holes of the baseplates of trial 100, this engagement occurs in a surgical approach direction that is perpendicular to the holes as claimed. There is a specific reference frame for one of ordinary skill in the art to know that a surgical approach direction is any of the above mentioned directions located along an axis perpendicular to an axis of the engagement holes. In light of the foregoing, Applicants respectfully assert that the 112, second paragraph rejection of pending claims 1-13 and 15-20 is overcome and the rejection should be withdrawn.

Still further in the Action, claims 1, 3, 5-7, 10-12, 18, 19 were rejected under 35 U.S.C. 102(e) as being anticipated by U.S. Pat. No. 6,471,725 to *Ralph et al.* ("Ralph"), claims 1, 3-7, 10-12, 14, 18-20 were rejected under 35 U.S.C. 102(e) as being anticipated by U.S. Pat. Pub. No. 2003/0175925 to Paponneau ("Paponneau"), claim 2 was rejected under 35 U.S.C. 103(a) as being unpatentable over Paponneau in view of U.S. Pat. No. 6,607,558 to Kuras ("Kuras"), claims 8 and 9 were rejected under 35 U.S.C. 103(a) as being unpatentable over Paponneau in view of U.S. Pat. No. 5,370,697 to Baumgartner ("Baumgartner"), claim 13 was rejected under 35 U.S.C. 103(a) as being unpatentable over Paponneau in view of U.S. Pat. No. 5,895,428 to Berry ("Berry"), and claim 15 was rejected under 35 U.S.C. 103(a) as being unpatentable over Paponneau in view of U.S. Pat. No. 5,899,941 to Nishijima *et al.* ("Nishijima").

With respect to 102(e) rejection of independent claims 1 and 18 in view of Ralph, Applicants respectfully assert that amended independent claims 1 and 18 are unanticipated by Ralph. Clearly, the trials disclosed in Ralph do not have engagement holes located in at least one of the inwardly facing surfaces of respective baseplates. The instruments shown in Figs. 5a-8c of Ralph are configured to engage the central trunk of the

disclosed trials. There is no indication anywhere in the specification of Ralph that at least one of the baseplates of the trials disclosed therein have a plurality of engagement holes extending into an inwardly facing surface of at least one of the baseplates in a direction substantially perpendicular to each of a plurality of a surgical approach directions used to insert the trial into an intervertebral space as claimed in independent claims 1 and 18. Therefore, Ralph cannot be used to anticipate amended claims 1 and 18. Claims 2-13 and 15-17 depending from claim 1 and claims 19-20 depending from claim 18 are also unanticipated, *inter alia*, because of their dependence from an unanticipated base claim. A dependent claim is necessarily narrower than a claim from which it properly depends.

Applicants respectfully assert that amended claims 1 and 18 are unanticipated by Paponneau because the cited reference does not disclose or suggest first and second baseplates immovably coupled to one another via a trunk extending therebetween. The Examiner asserts that Fig. 2 of Paponneau shows clips to "immovably couple" the plates together. As described in the specification of Paponneau, elements 40A and 40B are "retaining clips" designed to pass through retainer clip opening that extend through the endplates shown in FIG. 1 for securing the endplates to the respective upper and lower ends of main body 22. See paragraph [0030]. However, retaining clip 40A and 40B function to retain the endplates to main body 22 while allowing the endplates to pivot with respect to main body. As described in the specification, retaining clips 40A, 40B are resilient so as to snap fit in place for pivotably coupling first endplate 24 with main upper end 28 of body 22. In a similar fashion, second endplate 26 is secured to retaining clips 54A, 54B at a lower end 44 of main body 22. The spacer 20

disclosed in Paponneau, therefore, does not have endplates that are immovably coupled to a trunk extending therebetween as are the baseplates of static trial 100 of the claimed invention. In the present invention, the claimed baseplates do not move at all with respect to the trunk extending therebetween. Therefore, the baseplates are immovably coupled to the trunk extending therebetween. Accordingly, Papponeau does not anticipate amended claims 1 and 18. Claims 2-13 and 15-17 depending from claim 1 and claims 19-20 depending from claim 18 are also unanticipated, *inter alia*, because of their dependence from an unanticipated base claim. Further, each of the other cited references, namely Kuras, Baumgartner, Berry, or Nishijima cannot be used to cure the deficiencies of Papponeau and therefore a *prima facie* case of obviousness cannot be made using any combination of these references.

Accordingly, Applicants respectfully assert claims 1-13, and 15-20 are in condition for allowance. As it is believed that all of the rejections set forth in the Official Action have been fully met, favorable reconsideration and allowance are earnestly solicited. If, however, for any reason the Examiner does not believe that such action can be taken at this time, it is respectfully requested that he telephone Applicants' attorney at (908) 654-5000 in order to overcome any additional objections which he might have.

If there are any additional charges in connection with this requested amendment, the Examiner is authorized to charge Deposit Account No. 12-1095 therefor.

Dated: May 5, 2009

Respectfully submitted,

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